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No. 265

# In the Supreme Court of the United States

OCTOBER TERM, 1958

ROBERT JOHN MCNEIL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 21-24) is reported at 255 F. 2d 387.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1958. Rehearing was denied on June 11, 1958. On July 11, 1958, Mr. Justice Black signed an order extending the time within which to file a petition for a writ of certiorari to and including August 11, 1958. The petition for a writ of certiorari was filed on August 8, 1958. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Whether the trial judge erred in denying petitioner's motion for judgment of acquittal.

2. Whether there was a material misstatement in the trial judge's charge to the jury which would require reversal of the conviction.

3. Whether the court erred in its instructions as to permissible inferences from the testimony.

## STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Connecticut on an indictment charging a violation of 18 U.S.C. 659, by the possession of goods stolen from an interstate shipment, knowing them to have been stolen (R. 112). The following evidence was elicited at the trial from government witnesses:

On January 25, 1957, 607 cases of floor tile were shipped from Watertown, Massachusetts, on consignment to the ultimate destination in New York City (R. 4, 6). This shipment arrived at the Wallingford, Connecticut, terminal of the express company on January 25 (R. 11, 12, 15) and was transshipped to New York on the evening of January 27 (R. 16, 17). Upon arrival in New York, the shipment was checked by an employee of the express company and found to contain only 505 cases of floor tile (R. 23, 27).

At about 3 o'clock in the morning on January 27, Lester Gavette, who lives over his place of business at 63 to 67 Quinnipiac Avenue, North Haven, Connecticut, called the North Haven Police Department to report a disturbance adjacent to his home (R. 55-57). Upon investigation, within an hour of the phone call, the North Haven Police found the petitioner's suburban truck containing 21 cases of floor tile at the rear of

69 Quinnipiac Avenue (R. 29, 30, 34, 35, 36, 39, 42). The police found an additional 81 cases of floor tile in a chicken coop on the property a short distance away (R. 30, 34). The keys were in the ignition of the truck and the engine was still warm when the police arrived (R. 34).

There is no public access to the area on which the truck and the chicken coop is located. Petitioner, who lives at 69 Quinnipiac Avenue, North Haven, Connecticut, had such access (R. 34, 35, 42). Mr. Gavette knew of only one other individual who had a private right of passage (R. 62-63).

The 102 cases of floor tile were identified as part of the shipment of 607 cases from Watertown to New York City which had been held in the Wallingford terminal from January 25 to 27.

Lester Gavette testified that, in January 1957, the petitioner requested permission to use the chicken coop for storage purposes (R. 56). Gilbert Hough, a business associate of Gavette, testified that, in January 1957, the petitioner asked him for scrap lumber to cover the windows of the chicken coop (R. 67). He did not see the petitioner put up the covers, though he heard pounding (R. 67). Some of the windows were covered when the tile was found (R. 32, 38). Mr. Hough also testified that sometime thereafter he noticed a padlock on the chicken coop, though he was uncertain as to length of time it had been on (R. 68-70).

A sergeant in the North Haven Police Department testified that the petitioner, during questioning, said that he had rented the chicken coop for $25 a month to one Chick Jameson, a casual acquaintance whose address was unknown to him (R. 46, 74-75). Petitioner also said that he had allowed Jameson the use of his

truck for $10 (R. 46, 75). The North Haven Police Department and the Federal Bureau of Investigation were unable to locate such a person (R. 46-47, 75, 82). They also could not find one Mickey Zello, also called Mickey Mouse, with whom petitioner said he had been playing cards in the early morning of the 27th (R. 46, 72-73, 75, 82). Petitioner professed no knowledge concerning the tile or any elements of the crime when questioned by police (R. 37, 46, 72, 80).

The defense rested without putting in evidence of its own, but made a timely motion for judgment of acquittal (R. 84-93, 94). This was denied by the trial judge on the ground that the government had presented sufficient evidence to permit the case to go to the jury (R. 93, 94, 117). Upon appeal to the Court of Appeals for the Second Circuit, the conviction was affirmed by a *per curiam* decision.

## ARGUMENT

1. Petitioner attempts to convert an attack on the sufficiency of the evidence into an attack on the standard applied by the Court of Appeals in determining whether the trial judge erred in submitting the case to the jury (Pet. 6-10). The short answer to his contention is that, by the standard laid down by this Court, the evidence, which is summarized in the Statement, was sufficient to permit the jury to infer guilt beyond a reasonable doubt. This Court said long ago in *Stilson v. United States*, 250 U.S. 583, at 588:

> * * * As to the contention that there was no evidence to warrant the convictions of the accused—it must be borne in mind that it is not the province of this court to weigh testimony. It is sufficient to support the judgment of the District Court, if

there was substantial evidence inculpating the defendants which, if believed by the jury, would justify the submission of the issues to it.

See also *Abrams* v. *United States*, 250 U.S. 616 at 619; *Pierce* v. *United States*, 252 U.S. 239, 251-252; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254; *Glasser* v. *United States*, 315 U.S. 60, 80; *Gorin* v. *United States*, 312 U.S. 19, 32.

There is no real conflict among the circuits on this point of the scope of review in criminal cases, although there are, in different opinions, variations in language. The Second Circuit has recognized its duty to review the evidence to find a rational basis of guilt (see *United States* v. *Brown*, 236 F. 2d 403, 406 (C.A. 2)) whereas other circuits, like the Fifth, have stressed the fact that appellate courts cannot try the facts, *e.g.*, *Hargrove* v. *United States*, 139 F. 2d 1014 (C.A. 5). Basically, the decision turns on the particular facts of each case. Petitions for certiorari which have attempted the very argument proposed here as to a conflict of standards have been uniformly rejected, *e.g.*, *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2), certiorari denied, 351 U.S. 940; *Curley* v. *United States*, 160 F. 2d 229 (C.A. D.C.), certiorari denied, 331 U.S. 837; *United States* v. *Feinberg*, 140 F. 2d 592 (C.A. 2), certiorari denied, 322 U.S. 726; *Costello* v. *United States*, 222 F. 2d 656 (C.A. 2), certiorari denied, 350 U.S. 847.

2. As set forth in the Statement, *supra*, Mr. Hough testified that he observed a padlock on the coop sometime after defendant had asked him for scrap lumber to cover the windows of the coop (R. 68; see Pet. 26). On cross examination, he testified that he did not know how long it was there and could not say it had been pad-

locked for three months, but he did know that the door stood open for some time (R. 69-70; Pet. 26-27).

As to this, the judge charged the jury as follows:

> * * * And they [the Government] ask you that you find, draw an inference that he had dominion, actual control of the chicken coop from the evidence which they have presented, as to a request by him to use the coop, as to the boarding up of the windows and obtaining by the defendant of material to do that, and the evidence that there was then a padlock on the coop, although there had not been some time earlier.
>
> It is for you to say whether these inferences can reasonably be drawn from the testimony which you have heard * * *

Petitioner complains (Pet. 10-17) that the trial judge erroneously informed the jury as a fact that the government's evidence tended to prove the existence of a padlock on the chicken coop at the time of its use in the commission of the crime. The most that can be said in support of petitioner's contention, however, is that the word "then" is ambiguous. The judge may have intended, or the jury may have understood, the word to refer to the time of the commission of the crime, but it could just as easily in context refer to the time shortly before the commission of the crime.

3. The other portion of the charge which petitioner claims to be erroneous is the following:

> * * * They [the Government] apparently ask you to consider statements made by the defendant as to the use of the car by one Jameson, and the efforts made by the police and government agents to locate a person by that name, and failure to do so, in order to ask you to infer that that [sic] was no

such person in existence, and that that explanation of the possession by another of the car is without foundation. The Government asks you to draw those inferences.

As I have said, it is for you to determine whether you may reasonably draw such inferences from the facts which you do find to have been established in that case as to what search actually was made, and whether there was any such person thoroughly searched for, and not found, and whether the statement was made by the defendant.

The Court of Appeals correctly found that this was not error. The judge did not state that the inference was compelled, but that it was permissible. The rational basis of such inference is strengthened by the fact that, in view of petitioner's alleged dealings with the persons in question, petitioner was in a better position than the Government to produce them at the trial, if they existed.

## CONCLUSION

The decision below is correct, both in law and on the facts of the particular case. It discloses no conflict among the circuits or with the decisions of this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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SEPTEMBER, 1958.

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